

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ESTEP KYLER,

Petitioner,

v.

Civil Action No. 5:07CV52
(STAMP)

JOYCE FRANCIS, UNITED STATES
PAROLE COMMISSION,

Respondents.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE

I. Procedural History

On April 20, 2007, Estep Kyler filed a petition for writ of habeas corpus under 28 U.S.C. § 2241. The petitioner also filed a document titled "Consent to One Time Payment of \$5.00 Filing Fee." The case was referred to United States Magistrate Judge John S. Kaull pursuant to Local Rule of Prisoner Litigation Procedure 83.09 for initial review and report and recommendation. On August 29, 2007, because the Court had not received the required filing fee, the magistrate judge issued an order directing the petitioner to show cause why his action should not be dismissed for failure to prosecute. The petitioner did not respond to that order. To date, the petitioner has not paid the required filing fee or requested to proceed as a pauper.

On October 18, 2007, the magistrate judge entered a report recommending that the petitioner's § 2241 petition be dismissed

without prejudice for failure to prosecute. The petitioner has not filed objections to the report and recommendation.

II. Standard of Review

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. As to those portions of a recommendation to which no objection is made, a magistrate judge's findings and recommendation will be upheld unless they are "clearly erroneous." See Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979). Because the petitioner did not file objections, this Court reviews the report and recommendation for clear error.

III. Discussion

The magistrate judge found that as of the date of his report and recommendation, the petitioner had not paid the required filing fee, requested to proceed as a pauper, or otherwise explained his reasons for noncompliance. After a review of the pleadings in this action, this Court finds that the petitioner still has not paid the filing fee, requested to proceed as a pauper, or otherwise explained his reasons for noncompliance. Accordingly, this Court finds that the magistrate judge's report and recommendation is not clearly erroneous because the petitioner has failed to prosecute his case.

III. Conclusion

Because this Court concludes that the magistrate judge's recommendation is without clear error, this Court hereby AFFIRMS and ADOPTS the magistrate judge's report and recommendation in its entirety. Accordingly, the petitioner's petition pursuant to 28 U.S.C. § 2241 is hereby DISMISSED WITHOUT PREJUDICE for failure to prosecute. This civil action is hereby DISMISSED and STRICKEN from the active docket of this Court.

Finally, this Court finds that the petitioner was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action will result in a waiver of appellate rights. Because the petitioner has failed to object, he has waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the petitioner.

DATED: April 4, 2008

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE